

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

JOSEPH GABRIEL LOPEZ,  
*Petitioner.*

No. 2 CA-CR 2015-0045-PR  
Filed April 29, 2015

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

*See* Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

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Petition for Review from the Superior Court in Pima County

No. CR20073101001

The Honorable K.C. Stanford, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Barbara LaWall, Pima County Attorney  
By Heather A. Mosher, Deputy County Attorney, Tucson  
*Counsel for Respondent*

Harold L. Higgins PC, Tucson  
By Harold L. Higgins  
*Counsel for Petitioner*

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**MEMORANDUM DECISION**

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

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E C K E R S T R O M, Chief Judge:

¶1 Petitioner Joseph Lopez seeks review of the trial court’s order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Lopez has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Lopez was convicted of first-degree burglary and theft by control. The trial court imposed concurrent, enhanced, aggravated sentences, the longer of which was twenty years’ imprisonment for burglary. On appeal, this court vacated the sentence for theft by control, concluding it should have been a class four felony, rather than a class three felony, and affirmed the remaining conviction and sentence. *State v. Lopez*, No. 2 CA-CR 2008-0311 (memorandum decision filed Dec. 29, 2009). Lopez was resentenced to a ten-year prison term on the theft count. A Rule 32 proceeding, which had been stayed in the trial court during the appeal, was “terminated” at resentencing.

¶3 In 2010, Lopez sought and obtained post-conviction relief relating to his burglary sentence, and the trial court imposed a fourteen-year prison term on that count in 2011. On appeal after that resentencing, this court affirmed the new sentence. *State v. Lopez*, No. 2 CA-CR 2012-0050 (memorandum decision filed Oct. 29, 2012).

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¶4 In October 2014, Lopez filed a petition for post-conviction relief,<sup>1</sup> arguing he had received ineffective assistance of counsel in relation to a plea that was offered before trial. Lopez further asserted that if his claim was determined to be precluded, he was entitled to relief based on the ineffectiveness of his previous Rule 32 counsel in failing to raise the claim. The trial court summarily denied the claim, concluding that it was precluded based on Lopez's failure to raise it in a previous Rule 32 proceeding and that Lopez had not been entitled to effective assistance of counsel in his earlier proceedings.

¶5 On review, Lopez again argues his trial counsel was ineffective in relation to the plea and contends the trial court should not have rejected his claim of ineffective assistance of Rule 32 counsel. The trial court is correct. Arizona courts consistently have stated that, for non-pleading defendants like Lopez,<sup>2</sup> there is no constitutional right to counsel in post-conviction proceedings and, thus, despite the existence of state rules providing counsel, a claim that Rule 32 counsel was ineffective is not a cognizable ground for relief in a subsequent Rule 32 proceeding. *See State v. Mata*, 185 Ariz. 319, 336-37, 916 P.2d 1035, 1052-53 (1996); *State v. Krum*, 183 Ariz. 288, 291-92 & n. 5, 903 P.2d 596, 599-600 & n. 5 (1995); *Osterkamp v. Browning*, 226 Ariz. 485, ¶ 18, 250 P.3d 551, 556 (App. 2011); *State v. Armstrong*, 176 Ariz. 470, 474-75, 862 P.2d 230, 234-35 (App. 1993).

¶6 Therefore, although we grant the petition for review, we deny relief.

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<sup>1</sup>In his petition, Lopez asserted he had timely filed a notice of post-conviction relief after his second resentencing. No such notice appears in the record before us; but, in any event, the outcome of this proceeding would not be altered by such a notice.

<sup>2</sup>Lopez argues he "is not truly a non-pleading defendant" because this petition was filed after his resentencing. His being resentenced, however, does not alter the fact that he was not convicted pursuant to a guilty plea.